No. 14077

In the United States Court of Appeals for the Ninth Circuit

INTERSTATE COMMERCE COMMISSION ET AL., APPELLANTS

v.

THE MARTIN BROTHERS BOX COMPANY, A CORPORATION, APPELLEE

REPLY BRIEF FOR INTERSTATE COMMERCE COMMISSION, APPELLANT

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REPLY BRIEF FOR INTERSTATE COMMERCE COMMISSION, APPELLANT

This reply brief is respectfully submitted in accordance with Rule 18, paragraph 4, of the Rules of the United States Court of Appeals for the Ninth Circuit. The time for filing such brief was extended by the Court to June 8, 1954.

In our reply brief we shall first deal with the critique of appellee contained in its brief, page 29 et seq., under the heading of "The Brief of Appellant, Interstate Commerce Commission."

In the first paragraph, page 29 of appellee's brief, it is stated that the Commission is a party to this case "not by virtue of any interest in the subject matter, but solely by virtue of statutory necessity." It refers to the fact that the United States, the statutory defendant, has not participated in the case, except to file an answer in the District Court, and then asserts that the Commission has become "an active

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and biased advocate of the railroad." The answer to this assertion is that the Commission is here defending its own order as it has the right to do. 28 U. S. C. Section 2323. In *United States* v. *Interstate Commerce Commission,* 337 U. S. 426, 432, the Supreme Court held that:

> * * * The Interstate Commerce Act contains adequate provisions for protection of Commission orders by the Commission and by the railroads when, as here, they are the real parties in interest. For, whether the Attorney General defends or not, the Commission and the railroads are authorized to interpose all defenses * * *.

There is no basis for the statement that the Commission is "a biased advocate of the railroads" and we are surprised that appellee makes such a charge.

In subparagraphs (1) and (2), second paragraph, page 29 of appellee's brief, reference is made to two "inaccurate" statements appearing in the Commission brief at pages 5 and 8, respectively. The first is that we have referred to the Commission's order before this Court as the order "here under attack". This statement was an inadvertence on our part and what we intended to say was "the order here under review."

The second so-called inaccurate statement referred to by appellee, is that we have attempted to "twist legal conclusions of the Commission into findings of fact." Appellee points to page 5 of the Commission's brief where we have quoted verbatim the last paragraph of the Commission's report (R. 126), and page 8 where we again refer to this paragraph. We sub-

mit that the final paragraph of the Commission's report is an ultimate finding based upon the evidence of record which is analyzed and discussed in the report. When the report is read it will be seen that the Commission made numerous subsidiary findings which support this ultimate finding.

It is true the Commission has stated conclusions of law in its report under the heading of "Conclusions", but it has also made factual conclusions and ultimate findings under the same heading. *Chicago, B. & Q. R. Co.* v. *United States,* 60 F. Supp. 580, 583. It is denied that any inaccurate statement in this matter has been made in the Commission's brief and we deny any attempt "to twist legal conclusions of the Commission into findings of fact."

On page 32 of its brief appellee asserts that the testimony referred to in the Commission's brief (p. 26), showing that the fluctuation in the movement of traffic out of appellee's plant ranged from as little as 17 cars a month to over 100 cars a month (R. 615), was corrected by the witness before leaving the witness stand. It is true the witness stated on cross-examination (R. 632–633) that he did not intend to say that in one month during the complaint period Martin Box Company shipped as few as 17 cars and that the 17 cars referred to applied to the month of April 1945, long before the complaint period. However, the witness made it clear that by his testimony on this point he was "trying to show the variations in their [appellee's] demand for cars even in periods when there was no car shortage. It still is true today." (R. 632–633) Our failure to include this

correction on cross-examination was due to an oversight. But this testimony as corrected is still of evidentiary significance as supporting the contention that there was fluctuation in the movement of traffic from appellee's plant during the complaint period.

In regard to appellee's denial (p. 32 of its brief) that its president did not admit there was a critical car shortage on the Southern Pacific during the complaint period, and that there was no shortage of cars on this railroad during such period (as contended in the Commission's brief, p. 28), it is submitted as to the first proposition that appellee's president did refer to "the Southern Pacific car shortage" (R. 177) and when interrogated as to what he meant by "car shortage" or "what period," he replied (R. 178), "The period that the Southern Pacific just didn't deliver cars" in 1946 and 1947. It is asserted by appellee that the witness was referring to his company's own shortage rather than to that of the railroad. However, we do not agree with this interpretation of the testimony.

Appellee's asertion that there was no car shortage on the Southern Pacific at any time during the complaint period is contrary to the evidence. See Exhibit 29, R. 796; Exhibit 12, R. 781; testimony of witnesses R. 451–452, 503–504, 555–556, 560–566, 616–618; see Commission's report R. 116–118. We submit that it is a matter of common knowledge to all shippers of freight by rail and to the public generally that there has been for the past several years a shortage of cars on practically every railroad throughout the entire country. Appellee certainly knew of this fact, since

it was a shipper of considerable tonnage. This lends credence to our belief that its president was referring to the railroad's shortage of cars and not its own in his testimony above discussed. The evidence of record showing a shortage of cars, particularly box cars used by appellee for its shipments of box crates, is substantial.

On page 33 of appellant's brief, it is asserted that the reference in the Commission's brief (p. 29) to demurrage rules and regulations impliedly suggests that appellee was charged demurrage by the railroad. The Commission's reference to demurrage clearly was not intended to imply that appellee was charged demurrage on any of the cars furnished it. The reference made was merely for the purpose of showing the reasonableness of the requirement for furnishing cars only on specific orders and in support of this the example of demurrage rules and regulations was cited. In such rules and regulations it is made clear that in the absence of specific and definite car orders, the demurrage tariffs would be wholly without meaning as demurrage does not accrue on an empty car that has not been placed on the shipper's tracks pursuant to such orders (R. 587). Rules Nos. 1 and 6 of B. T. Jones' Tariff No. 4–Y (ICC No. 3963) and No. 4–Z (ICC No. 4257).

It is asserted (p. 33 of appellee's brief) the Commission's statement that the record shows appellee was furnished all the cars for which it placed "specific orders" (p. 29 of the Commission's brief) was intended "to induce this Court to believe that no requests for cars were made by Martin which were

not recorded on a written order form either by an agent of the Southern Pacific or an employee of Martin." It is submitted that what we intended to say, and actually said, was that appellee was furnished all the cars for which definite and specific orders were placed, whether oral or written. However, it appears from the evidence that written orders were filed for all cars placed during the period involved. (R. 638–639). See pages 9, 11, post. We do not contend that there was any requirement, during the complaint period, that car orders must be in writing as a prerequisite to delivery.

Appellee next finds fault (p. 39 of its brief) with the Commission's reference to the testimony of Witness Nelson (p. 31 of the Commission's brief) showing that due to the car shortage situation the Southern Pacific had received numerous complaints from other shippers during the complaint period. It states that the Commission assigns no reason why the testimony of this witness, as to the car shortage situation, should have more evidentiary value than the testimony of another Southern Pacific witness in a different case before the Commission who had testified on April 30, 1947, as to the availability of cars (R. 791–792) that:

> Well, the information that I am able to obtain right at the present time, particularly in the handling of lumber in the State of Oregon, there is no shortage of cars on Southern Pacific at the present time.

As to the testimony quoted above it will be noted that the witness was testifying as to conditions pre-

vailing on April 30, 1947,[1] and he made it plain that he was speaking "particularly" of lumber, which moves generally on open cars such as flat cars and gondolas, whereas appellee's president stated (R. 209) that the cars required for his shipments of wire-bound boxes "had to be box cars," which were water tight; also that box shooks had to be moved in the closed water-tight cars.[2]

Appellee's main business was the manufacture of wire-bound boxes, box shooks, plywood and veneer (R. 192), none of which ordinarily moves in anything other than box cars. The shipment of lumber during the period in question was of minor importance to appellee in comparison with his principal business.

Lastly, appellee (p. 39 of its brief) challenges the statement made in the Commission's brief (p. 32) that the record fails to show appellee was subjected to competition since it produced only boxes and was not engaged in the sale of lumber "as such". Appellee contends this is in error since the record shows that during the period here involved it produced, sold and transported, considerable lumber.

In reply to this assertion it is submitted that the record shows that appellee's entire enterprise is built around the box manufacturing business and that a considerable part of the shipments of its cut or sawn lumber during the period in question was to its plant

[1] The most critical period of car shortage on the Southern Pacific was the last six months of 1947. (R. 560, 565, 616).

[2] However, the witness stated that in a dry season he did accept a stock car for a movement of wire-bound boxes. (R. 209).

at Toledo, Ohio, to be used in manufacturing boxes. See Commission's report, R. 84, 85, 90, 424–425.

The gravamen of Martin Brothers Box Company's complaint before the Commission was with respect to its inability to secure sufficient cars for the shipment of wire-bound boxes, and cut and sawn lumber needed in this particular business.

No denial is here made of the fact that appellee is engaged in producing, transporting and selling some lumber as well as boxes but it is denied that the evidence of record shows that in regard to either lumber or wire-bound boxes that appellee was subjected to competition from others who received more favorable treatment in the matter of being furnished cars. Such a showing is required to establish undue preference, advantage, or prejudice before a violation of either Section 3 or Section 2 may be established. See *Tide Water Oil Co.* v. *Director General,* 62 I. C. C. 226, 227, and cases cited in our brief at p. 33. Appellee's failure to present such evidence was not the result of a lack of opportunity. The Commission's ultimate finding is (R. 126) that:

> * * * complainant [appellee herein] has failed to establish that defendant [Southern Pacific] during the complaint period * * * subjected complainant to any undue prejudice in violation of section 3.

It is submitted that questions under Section 3 (1) of the Act are peculiarly within the province of the Commission. *Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297, 304; *Barringer* v. *United States,* 319 U. S. 1, 11; *Chesapeake & Ohio Ry. Co.* v. *United*

States, 296 U. S. 187, 188; *Seaboard Air Line Ry. Co.* v. *United States,* 254 U. S. 57, 62, and cases cited therein. For the reasons stated above and those shown in Chapters II and III of our brief heretofore filed in this Court, the Commission was fully warranted in making the above finding.

As to whether or not the Southern Pacific failed in its duty to furnish reasonable car service to appellee in the period January 1 to September 30, 1947, it is submitted that the evidence of record, some of which has been referred to in Chapter II of the Commission's brief, shows that appellee received all the cars for which it placed specific and definite orders; that there was a car shortage of the type requested by appellee; that under the circumstances the distribution of cars among shippers (including appellee), made by the Southern Pacific, was just and reasonable; and that the treatment accorded appellee was equal to that accorded other shippers, who received no more cars than those for which definite orders had been placed.

It is further submitted that rail carriers should not be required to furnish cars to shippers requesting them except upon definite and specific orders. This is especially true in times of car shortage. The evidence shows that many requests of appellees for cars were indefinite and confusing as to the number actually needed (R. 609–610).

Appellee states at page 7 of its brief, under heading "Summary of Argument," that the examiner, the Commission and the Court all found that during the complaint period the Southern Pacific furnished all

shippers using its services, other than appellee "with from 80 to 100 percent" of their car requirements and that during such period appellee was furnished "less than 50 percent" desired and requested. That appellee is in error as to what the Commission found is shown by the following excerpt taken from its report (R. 118):

> In support of its contention that cars were distributed to the complainant on a reasonable basis, the defendant showed that during the period concerned the complainant received more cars than it requested by written car orders, whereas other shippers on its lines, including the Portland division, were furnished on the average only 80 percent of the cars ordered by them. From January 1 to June 30, 1947, cars were furnished to the complainant in practically complete compliance with written car orders, and in the remainder of the period more cars than ordered were furnished, but some delay was encountered. In the latter period, the distribution of cars to shippers on the Portland division, including the complainant, was made on a percentage-of-quota basis; that is, if the available car supply on a particular day was only 50 percent of the aggregate capacity of the district, each shipper was assigned only 50 percent of its quota, except that no cars would be assigned to a shipper which had no orders on file. During the first 6 months of the complaint period, the car shortage was not as severe as during the later period; but some shortage did exist, and cars were allegedly distributed to each shipper in proportion to the number of empty cars available.

The Commission then describes in its report the practice of appellee in furnishing "written car orders," as follows (R. 119):

> The complainant's practice with respect to furnishing written car orders was described by the Oakland local agent of the defendant. He testified that one of the complainant's employees made daily visits to his office and usually brought written car orders with him, but that he sometimes made out the orders at the office. He further testified, however, that it was the usual practice of this employee to first use the defendant's phone and call the defendant's office at Eugene, where most of the trains with empty cars for the complainant's plant originated, to find out how many cars had been assigned to the complainant that day and then place his order.
>
> Under normal conditions it is the practice for shippers to order the specific number of cars wanted, and therefore, the defendant insists that inasmuch as the complainant received more cars than were specifically ordered, it had no legitimate reason to complain that the distribution of cars made was other than reasonable. The complainant indicated generally that it wanted more cars than were furnished and this is admitted by the Oakland agent of the defendant. It appears that the written car order blanks, which were filled out and given to the defendant's agent after the complainant knew what cars had been assigned to it for the particular day, were to a large extent nothing more than a written confirmation, for the defendant's records, that the complainant wanted

> the cars that had been assigned to it for that day.

The Commission had found (R. 115) that evidence presented by a witness testifying for appellee "indicate[s] that cars approximately as ordered were promptly delivered to the complainant from January to June, inclusive, but that from July to September, inclusive, a considerable amount of delay in receiving cars was encountered." It then concluded and found (R. 124) that:

> The evidence establishes that from January 1 to June 30, 1947, complainant received practically all of the cars for which specific written car orders were placed; that thereafter in the complaint period more cars were furnished than were requested by written orders, though some delays were experienced; * * *.

The evidence on the record as a whole supports these findings and conclusions of the Commission. It, therefore, appears that instead of appellee receiving less than 50 percent of the cars for which it had placed definite and specific orders, that it received practically 100 percent of such cars.

CONCLUSION

For the reasons stated in our original brief as well as for those shown in this reply brief, we respectfully submit that the judgment of the District Court should be reversed, and the cause remanded with instructions that the Court below enter a judgment sustaining the Commission's order herein and that the cause be dismissed.

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